

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KRISTIN BAIN,

Plaintiff,

v.

METROPOLITAN MORTGAGE  
GROUP INC. et al.,

Defendants.

CASE NO. C09-0149-JCC

ORDER CERTIFYING QUESTION  
TO THE WASHINGTON SUPREME  
COURT

KEVIN SELKOWITZ,

Plaintiff,

v.

LITTON LOAN SERVICING LP et al.,

Defendants.

CASE NO. 10-5523-JCC

**I. BACKGROUND**

This Court previously ordered the parties in *Bain v. Metropolitan Mortgage Group Inc.*, No. C09-0149-JCC (W.D. Wash. removed Feb. 3, 2009), to show cause why this Court should

1 not decline to exercise supplemental jurisdiction over Plaintiff's state-law claims. In its order, the  
2 Court asked the parties to identify whether Washington law addresses Mortgage Electronic  
3 Registration Systems' (MERS)—and similar organizations'—ability to serve as the beneficiary  
4 and nominee of the lender under Washington's Deed of Trust Act when it does not hold the  
5 promissory note secured by the deed of trust. (Dkt. No. 130.) The Court also ordered the parties  
6 to identify whether Washington law addresses the legal effect in a nonjudicial foreclosure of an  
7 unauthorized beneficiary's appointment of a successor trustee. (*Id.*) The parties' responses  
8 demonstrated that Washington law does not specifically address these issues.

9       This Court later learned that a Washington Superior Court certified to the Washington  
10 Supreme Court similar (if not identical) questions involving MERS's role in the foreclosure  
11 process, namely, whether MERS was a lawful beneficiary under Washington's Deed of Trust  
12 Act and, if not, the resulting legal effect of the unlawful beneficiary. This Court stayed its cases  
13 involving MERS pending resolution by the Washington Supreme Court. *Bain v. Metropolitan*  
14 *Mortgage Group Inc.*, No. C09-0149-JCC (W.D. Wash. removed Feb. 3, 2009) (Dkt. No. 155);  
15 *Selkowitz v. Litton Loan Servicing LP*, No. C10-5523-JCC (W.D. Wash. removed July 27, 2010)  
16 (Dkt. No. 39).

17       On April 25, 2011, the Commissioner of the Washington Supreme Court, Steven Goff,  
18 entered a ruling denying discretionary review of the Superior Court's certified question. Under  
19 Washington Rule of Appellate Procedure 2.3(a), "a party may seek discretionary review of any  
20 act of the superior court not appealable as a matter of right." The Commissioner concluded that  
21 because the Superior Court had not yet ruled on the merits of the MERS issue, there was no "act"  
22 of the Superior Court on which to seek discretionary review.

23       Although the Superior Court's certification was not the proper vehicle for review by the  
24 Washington Supreme Court, the Commissioner described both the importance of the legal  
25 questions posed by the Superior Court as well as the probability that the Washington Supreme  
26 Court would eventually address the issue:

I agree with Mr. Vinluan that whether MERS can be a deed of trust beneficiary under Washington law is an important issue that deserves resolution, probably by this court. It appears that there is considerable ongoing foreclosure litigation on the point in both state and federal courts, with no authority from this court [or] the Court of Appeals to guide those decisions.

*Vinluan v. Fidelity Nat'l Title & Escrow Co.*, No. 85637-1, at \*4 (Wash. Apr. 25, 2011) (ruling denying review).<sup>1</sup>

## II. CERTIFICATION

Pursuant to Washington Revised Code section 2.60.020,

When in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined, such federal court may certify to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto.

The certification process serves the important judicial interests of efficiency and comity. As noted by the United States Supreme Court, certification saves “time, energy, and resources and helps build a cooperative judicial federalism.” *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Because this matter involves important and far-reaching issues of first impression regarding MERS’s ability to serve as the beneficiary and nominee of the lender under Washington’s Deed of Trust Act, this matter should be presented for expedited review to the Washington Supreme Court. The following questions are hereby certified to the Washington Supreme Court:

1. Is Mortgage Electronic Registration Systems, Inc., a lawful “beneficiary” within the terms of Washington’s Deed of Trust Act, Revised Code of Washington section 61.24.005(2), if it never held the promissory note secured by the deed of trust?

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<sup>1</sup> The Commissioner also noted that this Court had stayed its cases pending the Washington Supreme Court’s decision whether to accept certification from the Superior Court.

